IN THE HIGH COURT OF JUDICATURE

ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE MR JUSTICE J.CHELAMESWAR

and
THE HON'BLE MR JUSTICE M.E.N.PATRUDU

WRIT PETITION NO :24912 of 2005

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Dated: 22nd February 2006.

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Between:

Rednam Satyanarayana Murthy

..... PETITIONER

AND

The District Tribal Welfare Officer, East Godavari District, Rampachodavaram and others

.....RESPONDENTS

THE HON'BLE SRI JUSTICE J.CHELAMESWAR

AND

THE HON'BLE SRI JUSTICE M.E.N.PATRUDU

W.P.NO.24912 OF 2005

ORAL ORDER:

(Per the Hon'ble Sri Justice J.Chelameswar)

Aggrieved by an order in O.A.No.4516 of 2005, dated 18-11-2005, on the file of the Andhra Pradesh Administrative Tribunal (for short the 'Tribunal'), the unsuccessful applicant therein filed the present writ petition with the prayer as follows:

> " For the reasons stated in the accompanying affidavit it is prayed that this Hon'ble Court may be pleased to issue an order or orders more particularly one in the NATURE OF WRIT OF CERTIORARI calling for the records of the 2nd respondent issued in Proc. Rc.No.T17/144/2005, dated: 12-8-2005 and quash the same, by holding and declaring that the Judgment of the A.P. Administrative Tribunal in O.A.No.4516/2005, dated: 18-11-2005 is illegal and liable to be quashed and further declare that the petitioner is entitled for exemption from passing the Departmental Test on crossing the age of 45 years on 11-6-2003 and further direct the Official Respondents to regularize the service of the petitioner as Senior Assistant w.e.f. 11-6-2003 with all consequential benefits such as arrears of salary, increments, seniority etc and pass such other orders or orders as this Hon'ble Court may deem, fit, proper and necessary in the circumstances of the case."

The writ petitioner was initially appointed as a Watchman and his services were regularized with effect from 24-01-1982 in the Tribal Welfare Department of the State of Andhra Pradesh. On 31-08-1993, he was appointed, by transfer, as Junior Assistant in the same Department. In the year 1999, the petitioner filed O.A.No.1985 of 1999 on the file of the Andhra Pradesh Administrative Tribunal, seeking a direction to the State of Andhra Pradesh, to promote him as a Senior Assistant. It appears that the Tribunal granted an interim direction to consider the case of the

petitioner for promotion, pursuant to which, the petitioner was promoted as a Senior Assistant, by an order dated 15-05-1999, temporarily, subject to the condition that he should pass the requisite departmental tests within a period of two years from the date of the promotion. The relevant portion of the said order reads as follows:

> "The above individual has to pass the required departmental tests within 2 years from the date of promotion, failing which his increment in the time scale of pay applicable to him shall be stopped without cumulative effect; and he shall forefeit his right and he will be reverted to the lower category from which he promoted."

Under the A.P. Ministerial Service Rules, 1998 (for short the 'Ministerial Rules'), which, admittedly govern the promotion to the post of a Senior Assistant, Rule 11 (b) stipulates that no person shall be eligible for promotion or appointment, by transfer, to the post of Senior Assistant in the Tribal Welfare Department, unless the said person passes the tests specified in Annexure-II of the Ministerial Rules. Therefore, the order of promotion and the condition imposed, which is already extracted earlier, must be construed as an order granting relaxation from the operation of the purview of Rule 11(b) of the Ministerial Rules of the State in exercise of the powers conferred under Rule 32 of the A.P. State and Subordinate Service Rules.

Admittedly, the petitioner did not acquire the above-indicated qualification within the stipulated period of two years, but he took six long years to acquire the said qualification.

The Government in G.O.Ms.No.165 made an ad hoc rule, in exercise of the powers conferred under Article 309 of the Constitution of India on 22-04-1997, which reads as follows:

> "Notwithstanding anything contained in the Andhra Pradesh State and 0Subordinate Service Rules or in the Special Rules or Adhoc Rules, the Government Employees who have crossed 45 years of age shall be exempted from passing Departmental tests prescribed in the Special Rules/Adhoc Rules for the purpose of Promotion to the next higher category (i.e) 0promotion/appointment by transfer to a post above the one held by him/her if they could not pass the same."

The substance of the rule is that, notwithstanding any stipulation made in any relevant rule, all the employees of the State, who cross the age of 45 years are exempted from passing any departmental tests prescribed for seeking promotion under the relevant rules. The said rule held the field for a period of two years. It did not prescribe any limitation whatsoever, either with reference to the posts to which the promotion is sought for or with reference to the past service history of the seeker of the promotion. However, the Government of Andhra Pradesh in G.O.Ms.No.225, dated 18-05-1999, made another ad hoc Rule in exercise of the powers under Article 309 of the Constitution with retrospective effect from 22-04-1997, i.e., the date on which G.O.Ms.No.165, was issued. The new rule insofar as it is relevant for our purpose reads as follows:

> "Notwithstanding anything contained in the Andhra Pradesh State and Subordinate Service Rules or in the Special Rules or in ad hoc rules, the Government Employees who have crossed 45 (forty five) years of age shall be exempted from passing the departmental tests prescribed in the Special rules or the ad hoc for the purpose of promotion to the next higher category i.e., promotion or appointment by transfer involving promotion to a post above the one held; by him or her, if they could not get even one promotion after their initial appointment.
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> Provided that the persons who already got a promotion once where no tests are prescribed for the higher post, the exemption is not applicable to him or her if he or she is to be considered for further promotion to next higher category where tests are prescribed. (This ad hoc rule is applicable from the panel year 1997-98.)"

It can be seen from the above extracted portion of the rule that while the benefit sought to be conferred under the G.O.Ms.No.165 is continued in principle, certain limitations are now imposed under the amended rule, on the seekers of the benefit, viz., A person seeking to avail the benefit of crossing the age of 45 years can only claim the benefit only once i.e., the benefit is confined only to one promotion and any person, who had already been promoted once in service, cannot claim the benefit, conferred under the rule, for a second promotion. The Proviso, however, in our view, qualifies the first part of the rule, that the limitation imposed on the first part of the amended rule would be applicable to those cases, where the second promotion sought is to that of a selection post. At any rate, that was the interpretation

placed by a Division Bench of this Court, on the amended rule, in **J.PARAVATHALU v. ANDHRA PRADESH ADMINISTRATIVE TRIBUNAL, HYD. AND OTHERS** , which is to the following effect:

> "10. The petitioner, therefore, when appointed as Junior Assistant, the appointment was made by way of transfer and not by way of promotion. Furthermore, the post of Senior Assistant is a non-selection post as would appear from Rule 5 of the A.P. State and Subordinate Service Rules, which reads:
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> "*Selection Posts*:- (a) All first appointments to a State Service and all promotions/appointments by transfer in that service shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, by the appointing authority as specified in sub-rule (a) or Rule 7 from the panel of candidates. Such panel shall be prepared as laid down in Rule 6 by the appointing authority or any other authority empowered in this behalf.
>
> (b) *Non-selection posts*:- Non non-Gazetted post should be treated as selection post. Promotion and appointment by transfer to higher posts other than those mentioned in sub-rule (a) shall be made in accordance with seniority-cum-fitness, unless:
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> (i) such promotion or appointment by transfer of a member has been withheld as a penalty; or
>
> (ii) a member is given special promotion for conspicuous merit and ability."
>
> In terms of the aforementioned rule, no non-Gazetted post is treated as a selection post. Promotion and appointment by transfer to a higher post other than the non-Gazetted post is required to be made in accordance with seniority-cum-fitness."

In the meanwhile, the 6th respondent, who, admittedly, was junior to the petitioner in the cadre of Junior Assistants, passed the tests (referred to earlier) contemplated under Rule 11(b) of the Rules and therefore, competent and qualified to be promoted as a Senior Assistant, went on making representations that since he, a qualified Junior Assistant, is available for being promoted as Senior Assistant, the continuance of the petitioner as Senior Assistant on temporary basis relaxing the operation of Rule 11(b) of the Rules, is illegal. Finally, the 2nd respondent by his order dated 12-08-2005 reverted the petitioner as Junior Assistant. The petitioner

challenged the said order of reversion in O.A.No.4516 of 2005.

Consequent upon the reversion of the petitioner, the 6th respondent, who is otherwise qualified to be promoted as Senior Assistant, came to be promoted by the proceedings of the 2nd respondent dated 13-08-2005. It appears that the order of reversion of the petitioner is served on the petitioner on 17-08-2005, which was challenged in the abovementioned O.A. The O.A. stood dismissed by an order dated 18-11-2005, by the Tribunal and hence, the present writ petition.

The petitioner asserts that on 11-06-2003, he crossed the age of 45 years.

The learned counsel for the petitioner submits that irrespective of the fact whether the petitioner acquired the requisite qualification, contemplated under Rule 11(b) of the Rules or not, by virtue of the operation of the G.O.Ms.No.165, as amended by G.O.Ms.No.225, referred to earlier, at least, from 11-06-2003, the petitioner is clearly entitled to be promoted as a Senior Assistant. Therefore, the order dated 12-08-2005, reverting him from the post of the Senior Assistant, is illegal.

On the other hand, the learned counsel for the 6th respondent submits that the reversion of the petitioner by order dated 12-08-2005 is in view of the condition imposed in the order of temporary promotion that the petitioner should pass the relevant tests indicated earlier and as the petitioner did not pass the said tests, the condition attached to the relaxation at the point of time of the temporary promotion of the petitioner, worked itself out, thereby, making the continuation of the petitioner in the post of Senior Assistant, as illegal and without any authority of law.

Unfortunately, the relaxation granted while temporarily promoting the petitioner on 15-05-1999 elapsed by 14-05-2001. The official respondents did not take note of it nor any consequential action was taken either by the official respondents or by the 6th respondent by challenging the continuance of the petitioner in the post of Senior Assistant. However, by the date on which the reversion order came to be passed i.e., on 12-08-2005, the rule, that was in operation is the rule framed under G.O.Ms.No.225, (relevant portion of which is already extracted) in substance it is an exception to the rule contained under Rule

11(b) of the Rules. The petitioner is, therefore, entitled to be promoted, on his crossing the age of 45 years, i.e., on 11-06-2003, by virtue of the operation of the rule made under G.O.Ms.No.225, as Senior Assistant. Irrespective of the legality or otherwise of his continuance in the post of Senior Assistant between 14-05-2001 and 11-06-2003, there was no illegality in continuing the petitioner as a Senior Assistant with effect from 11-06-2003, subject, of course, to the condition that he is the senior most available, which fact is not in dispute.

The learned counsel for the 6th respondent, however, argued that even on an application of the rule under G.O.Ms.No.225, the petitioner is not entitled to be promoted as Senior Assistant as he had already secured a promotion in his service and the language of the rule framed there under, clearly excludes the persons like the petitioners, who had already been promoted once in their service, and therefore, even after 11-06-2003, the petitioner's continuance as Senior Assistant, cannot be considered as legal.

The ad hoc rule framed under G.O.Ms.no.225, no doubt, restricts the benefit to a limited class of seekers of promotion, i.e., those, who did not secure any promotion earlier in their service, but the language of the Proviso to the said rule is construed by a Division Bench of this Court to mean that the exclusion of the benefit in the context of a second promotion is only in those cases, where the second promotion is to a post based on a process of selection, but not purely on seniority.

Admittedly, in the present case, the post of Senior Assistant is not a selection post, therefore, we do not see any merit in the submission of the learned counsel for the 6th respondent.

For the above-mentioned reasons, the writ petition is allowed, directing the respondents to notionally promote the petitioner with effect from 11-06-2003 to the post of Senior Assistant with all consequential benefits. No costs.

We are informed that notwithstanding the promotion of the 6th respondent in the interregnum, as of now, there is post of Senior Assistant vacant and available for promotion of the petitioner.

J.Chelameswar, J

M.E.N.Patrudu, J

22nd February 2006

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